A **LUCY WONG NYUK KING & ANOR v. HWANG MEE HIONG**

FEDERAL COURT, PUTRAJAYA
MD RAUS SHARIF PCA
AHMAD MAAROP FCJ
MOHAMED APANDI ALI FCJ
B RAMLY ALI FCJ
AZAHAR MOHAMED FCJ
[CIVIL APPEAL NO: 02(f)-98-12-2014 (Q)]
7 APRIL 2016

C ***CONTRACT:*** *Sale and purchase agreement – Sale and purchase of property – Breach – Allegation of – Property damaged by fire before payment of balance purchase price – Delivery of vacant possession – Deeming provision in sale and purchase agreement ('SPA') that vacant possession of property delivered to purchaser upon signing of agreement – Whether rebuttable or conclusive – Whether vacant* D *possession delivered to purchaser before occurrence of fire – Whether purchaser's termination of agreement justified*

CONTRACT: *Agreement – Construction of clauses – Sale and purchase of property – Whether contract to be construed as a whole – Deeming provision in cl. 5 of SPA that vacant possession of property delivered to purchaser upon signing* E *of agreement – Whether conclusive or rebuttable – Whether vacant possession delivered to purchaser before occurrence of fire – Whether cl. 16 of SPA implied delivery of vacant possession not deemed conclusive upon signing of SPA – Whether purchaser could rely on cl. 15 of SPA to terminate contract*

F ***WORDS & PHRASES:*** *'shall be deemed' – Provision of clause in agreement – Whether a rebuttable presumption – Whether application of deeming provisions limited to extent needed to avoid injustice or absurdity*

The defendants were the co-proprietors of a double storey intermediate terraced shophouse ('the property'). By a sale and purchase agreement G ('the SPA'), the defendants agreed to sell the property to the plaintiff for RM320,000 out of which the plaintiff had paid a deposit of RM55,000 leaving a balance sum of RM265,000 to be settled. At the material time, the plaintiff's husband ('PW2') was renting the property from the defendants. After the SPA was signed, the defendants had not terminated the tenancy agreement and the tenancy continued until the occurrence of a fire on H 5 November 2008 that rendered the property unfit for occupation. On 13 November 2008, the plaintiff served a notice of termination under cl. 15 of the SPA to the defendants and requested for the return of the deposit and part payment of RM85,000 previously paid. On 19 January 2009, the defendants asked the plaintiff to pay the balance of the purchase price within I 30 days. The plaintiff thus commenced the present action against the defendants, seeking, among others (i) specific performance of the contract; and (ii) alternatively, damages *in lieu* of specific performance for breach of

contract with assessment of damages on the consequential loss and damage. In their counterclaim, the defendants claimed general damages for breach of contract and sought, *inter alia*, payment of RM315,000 for the loss and damages sustained by the defendants. In giving judgment in favour of the plaintiff, the High Court found that on the occurrence of a fire, the plaintiff not having been handed over vacant possession of the property by the defendants, was perfectly within her rights to terminate the agreement pursuant to cl. 15. According to the High Court, the defendants having continued to maintain possession of the property through the tenancy agreement, and not delivering vacant possession of the same had, therefore, rebutted the deeming provision in cl. 5 of the SPA. The Court of Appeal agreed with the findings of the High Court and held that the plaintiff's reliance on cl. 15 of the SPA to terminate the agreement was entirely justified. The Court of Appeal also dismissed the defendants' counterclaim. Aggrieved, the defendants appealed.

Held (dismissing defendants' appeal)
Per Azahar Mohamed FCJ delivering the judgment of the court):

(1) The dispute between the two parties in substance revolved around the construction of a written contract and its clauses. It is an established principle of construing a contract that, among others, a contract must be construed as a whole, in order to ascertain the true meaning of its several clauses, and also, so far as practicable, to give effect to every part of it. Each clause in an ordinary commercial contract should be so interpreted as to bring them into harmony with the other clauses of the contract. (para 34)

(2) Clause 15 of the SPA unequivocally provided that in the event before the delivery of vacant possession, the property was destroyed or damaged by a fire and other causes, either party was entitled to unilaterally rescind the contract by a written notice whereupon the defendants as vendors shall, on demand forthwith, refund to the plaintiff as purchaser the deposit and all whatsoever monies paid and in any event not exceeding fourteen days upon receipt of written notification. (para 40)

(3) By cl.1 of the SPA, it was for the defendants to give vacant possession of the property to the plaintiff. To put into effect the deeming provision in cl. 5 (where it was stated that vacant possession of the said property shall be deemed to be delivered by the vendor to the purchaser upon signing of agreement) both the parties must sign the SPA. In the circumstances, the deeming provision in cl. 5 of the SPA was not conclusive, and that like any other presumption, was rebuttable. If something is 'deemed' in a situation where it was clearly wrong or

inappropriate, which would lead to injustice or absurdity, the application of the deeming provisions should be limited to the extent needed to avoid such injustice or absurdity. (paras 46 & 52)

(4) Clause 16 of the SPA unambiguously provides that the risk and benefit of any insurance of the property still remained with the vendors until delivery of vacant possession, whereupon the risk shall pass to the purchaser and that the purchaser shall be responsible for arranging insurance coverage on the said property with effect from the date of delivery of vacant possession. The defendants herein had claimed and received a sum of RM85,000 from the insurance company as fire insurance compensation for the damage to the property caused by a fire. The defendants had the benefit of the risk in the said property and had received from the insurer the said amount as compensation. (para 52)

(4a) It was apparent that even with the deeming provision in cl. 5, the provision in cl.16 of the SPA would seem to imply that even upon signing of the SPA on 23 September 2008, the delivery of the vacant possession was not deemed conclusively. The effect of cl. 16 was that the expression 'shall be deemed' in cl. 5 was only meant to be a presumption that was rebuttable, for otherwise it would lead to injustice or absurdity in a situation where it was found that in fact and truth vacant possession of the property had never been delivered to the purchaser. (para 53)

(5) There was more than sufficient uncontroverted evidence to support the concurrent findings of the High Court and the Court of Appeal. The defendants had never delivered vacant possession of the property to the plaintiff before the occurrence of a fire on 5 November 2008. Under the circumstances, the plaintiff's reliance on cl. 15 of the SPA to terminate the agreement was wholly justified and in accordance with the terms and conditions of the SPA. The defendants' counterclaim was therefore rightly dismissed (paras 59-61)

Bahasa Malaysia *Headnote*

Defendan-defendan adalah pemilik bersama sebuah rumah kedai dua tingkat ('hartanah'). Melalui satu perjanjian jual beli ('PJB'), defendan-defendan bersetuju untuk menjual hartanah tersebut kepada plaintif untuk jumlah RM320,000 di mana plaintif telah membayar deposit sebanyak RM55,000 meninggalkan baki jumlah RM265,000 untuk dilunaskan. Pada ketika itu, suami plaintif ('PW2') sedang menyewa hartanah tersebut dari defendan-defendan. Selepas PJB ditandatangani, defendan-defendan tidak membatalkan perjanjian sewaan dan sewaan tersebut berterusan sehingga kejadian satu kebakaran pada 5 November 2008 yang menyebabkan hartanah tersebut tidak sesuai untuk didiami. Pada 13 November 2008, plaintif mengeluarkan notis penamatan di bawah kl. 15 PJB kepada defendan-defendan dan meminta pemulangan deposit dan sebahagian bayaran

RM85,000 yang telah dibayar sebelum ini. Pada 19 Januari 2009, defendan-defendan meminta plaintif membuat bayaran baki harga belian dalam tempoh 30 hari. Dengan itu, plaintif memulakan guaman ini terhadap defendan-defendan, menuntut, antara lain (i) pelaksanaan spesifik kontrak dan; (ii) secara alternatif, ganti rugi sebagai ganti pelaksanaan spesifik bagi pelanggaran kontrak dengan taksiran ganti rugi ke atas kerugian berbangkit dan kerugian kerosakan. Dalam tuntutan balasnya, defendan menuntut ganti rugi am untuk pelangggaran kontrak dan menuntut, antara lain, bayaran RM315,000 untuk kerugian dan kerosakan yang dialami defendan-defendan. Dalam memutuskan penghakiman yang memihak kepada plaintif, Mahkamah Tinggi mendapati bahawa dalam kejadian kebakaran, di mana plaintif tidak diberikan milikan kosong hartanah oleh defendan-defendan, plaintif mempunyai hak untuk menamatkan perjanjian menurut kl. 15. Menurut Mahkamah Tinggi, defendan-defendan terus mengekalkan pemilikan hartanah tersebut melalui perjanjian sewa, dan tidak menyerahkan milikan kosong, oleh itu, menyangkal peruntukan kl. 5 PJB. Mahkamah Rayuan bersetuju dengan dapatan Mahkamah Tinggi dan memutuskan bahawa sandaran plaintif pada kl. 15 PJB untuk membatalkan perjanjian adalah wajar. Mahkamah Rayuan juga telah menolak tuntutan balas defendan-defendan. Terkilan, defendan-defendan merayu.

Diputuskan (menolak rayuan defendan-defendan)
Oleh Azahar Mohamed HMP menyampaikan penghakiman mahkamah:

(1) Pertikaian antara kedua-dua pihak berkisar pada konstruksi kontrak bertulis dan klausa-klausanya. Adalah satu prinsip mantap bahawa dalam mentafsirkan kontrak, ia perlu, antara lain, ditafsirkan secara keseluruhan, dalam menentukan makna sebenar klausa-klausanya, dan juga, setakat yang boleh dilaksanakan, memberi kesan kepada setiap bahagian. Setiap klausa dalam satu kontrak komersial yang biasa hendaklah ditafsirkan supaya berharmonis dengan klausa-klausa lain dalam kontrak.

(2) Klausa 15 PJB tanpa ragu-ragu menyediakan bahawa sekiranya sebelum penyerahan milikan kosong, hartanah tersebut musnah atau rosak oleh kebakaran atau apa-apa sebab, pihak-pihak yang terlibat berhak secara unilateral untuk membatalkan kontrak melalui notis bertulis di mana defendan-defendan, sebagai penjual harus, apabila diminta dengan serta-merta, membayar balik kepada plaintif sebagai pembeli deposit dan segala wang yang dibayar tidak melebihi 14 hari apabila menerima penerimaan notifikasi bertulis.

(3) Melalui kl.1 PJB, adalah untuk defendan-defendan menyerahkan milikan kosong hartanah kepada plaintif. Untuk melaksanakan kesan peruntukan kl. 5 (yang menyatakan bahawa milikan kosong hartanah tersebut disifatkan telah diserahkan oleh penjual kepada pembeli selepas

perjanjian ditandatangani), kedua-dua pihak harus menandatangani PJB. Dalam keadaan sedemikian, peruntukan kl. 5 PJB tidak konklusif, dan seperti mana-mana anggapan lain, boleh dipatahkan. Jika ada sesuatu yang 'dianggap' dalam situasi di mana ia dengan jelasnya salah atau tidak sesuai, yang boleh membawa kepada ketidakadilan atau kemustahilan, pemakaian peruntukan itu harus dihadkan setakat yang diperlukan bagi mengelakkan ketidakadilan atau kemustahilan.

(4) Klausa 16 PJB secara jelas memperuntukkan bahawa risiko dan faedah mana-mana insurans hartanah kekal dengan pembeli sehingga penyerahan milikan kosong di mana risiko akan berpindah kepada pembeli dan pembeli akan bertanggungjawab untuk mengatur perlindungan insurans ke atas hartanah tersebut berkuat kuasa dari tarikh penyerahan milikan kosong. Defendan-defendan di sini menuntut dan menerima jumlah RM85,000 daripada syarikat insurans sebagai ganti rugi insurans kebakaran untuk kerosakan ke hartanah yang disebabkan oleh kebakaran itu. Defendan-defendan mendapat manfaat dari risiko dalam hartanah tersebut dan menerima daripada syarikat insurans jumlah tersebut sebagai pampasan.

(4a) Adalah jelas dengan terdapatnya peruntukan kl. 5, peruntukan kl. 16 PJB seolah-olah mengimplikasikan bahawa walaupun PJB ditandatangani pada 23 September 2008, penyerahan milikan kosong tidak dianggap konklusif. Kesan kl. 16 adalah pernyataan 'shall be deemed' hanya dimaksudkan satu anggapan yang boleh disangkal, kerana jika tidak ia boleh mendorong kepada ketidakadilan atau kemustahilan dalam situasi di mana milikan kosong hartanah tersebut tidak diserahkan kepada pembeli.

(5) Terdapat keterangan yang memadai untuk menyokong dapatan-dapatan Mahkamah Tinggi dan Mahkamah Rayuan. Defendan-defendan tidak menyerahkan milikan kosong hartanah tersebut kepada plaintif sebelum kejadian kebakaran pada 5 November 2008. Atas keadaan sedemikian, pergantungan plaintif kepada kl. 15 PJB untuk menamatkan perjanjian adalah wajar dan mengikut terma dan syarat PJB. Tuntutan balas defendan-defendan, dengan itu, ditolak dengan betul.

Case(s) referred to:

Amanah Merchant Bank Bhd (Formerly known as Amanah-Chase Merchant Bank Bhd) v. Lim Tow Choon (Through Official Assignee) [1994] 2 CLJ 1 SC ***(dist)***

Australian Broadcasting Commission v. Australasian Performing Right Association Limited [1973] 129 CLR 99 ***(refd)***

Canadian Imperial Bank of Commerce v. Haley (1979) 100 DLR (3d) 470 ***(refd)***

Chamber Colliery Company Ltd v. Twyerould (1893) [1915] 1 Ch 268 ***(refd)***

Ching Yik Development Sdn Bhd v. Setapak Heights Development Sdn Bhd [1997] 1 CLJ 287 ***(refd)***

Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd [2015] 2 CLJ 453 FC ***(refd)***

Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***

Lafarge Aggregates Ltd v. Newham London Borough Council [2005] 2 Lloyd's Rep 577 ***(refd)***
Marshall (Inspector of Taxes) v. Kerr [1993] STC 360 ***(refd)***
Mesuma Sports Sdn Bhd v. Majlis Sukan Negara Malaysia; Pendaftar Cap Dagangan Malaysia (Interested Party) [2015] 9 CLJ 125 FC ***(refd)***
Mulpha Pacific Sdn Bhd v. Paramount Corporation Bhd [2003] 4 CLJ 294 CA ***(refd)***
National Coal Board v. Wm Neill & Son (St Helens) Ltd [1984] 1 All ER 555 ***(refd)***
R v. Westminster Unions Assessment Committee; Ex parte Woodward & Sons (1917) 1 KB 832 ***(refd)***
Royal Selangor Golf Club v. Anglo-Oriental (M) Sdn Bhd [1990] 1 CLJ 995; [1990] 3 CLJ (Rep) 37 HC ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 78(1)

Other source(s) referred to:
Lewison, *The Interpretation of Contracts*, 5th edn, paras 7.02 & 14.12
McMeel, *The Construction of Contracts, Interpretation, Implication and Rectification*, 2nd edn, 2011, para 1.73

For the appellants - Tai Choi Yu; M/s Tai Choi Yu & Co
For the respondent - Henry Ling Kuong Meng; M/s Ling & Wong

[Editor's note: For the Court of Appeal judgment, please see Lucy Wong Nyuk King & Anor v. Hwang Mee Hiong [2014] 8 CLJ 865 (affirmed); For the High Court judgment, please see [2012] 1 LNS 319 (affirmed).]

Reported by Suhainah Wahiduddin

JUDGMENT

Azahar Mohamed FCJ:

Introduction

[1] In the High Court, the respondent sued both the appellants for specific performance or damages for breach of contract under a written agreement for the sale and purchase of a property belonging to the appellants, which was damaged by a fire after a deposit was paid but before the balance of the purchase price was due to be paid.

[2] The appellants in turn brought a counterclaim for what they alleged to be a breach of contract on the part of the respondent.

[3] We shall be referring to parties in this judgment in their respective capacity in the High Court, that is to say, the appellants as the defendants and the respondent as the plaintiff.

[4] The High Court had, after a full trial with three witnesses from the plaintiff and four witnesses from the defendants, allowed the plaintiff's claim. As for the defendants' counterclaim, it was dismissed.

[5] Aggrieved by the decision of the High Court, the defendants appealed to the Court of Appeal *vide* Civil Appeal No. Q-02-1398-06-2012 and on 12 April 2013, the appeal was dismissed.

[6] Following the decision of the Court of Appeal, the defendants had filed an application for leave to appeal to this court and on 19 November 2013, this court granted leave to appeal to the defendants on two questions of law. Hence, the present appeal.

[7] We heard the appeal. At the conclusion of the hearing of the appeal, by unanimous decision, we dismissed it. We now give our reasons.

Background Facts

[8] The background facts were very straightforward and not much was disputed although there was considerable disagreement flowing from the rival contentions of the parties with regard to the construction of several clauses in the written agreement.

[9] At all material times, the defendants were the co-proprietors of that parcel described as Lot 437 Block 22 Buan Land District, Sarawak together with one unit of double storey intermediate terraced shophouse for commercial and residential purposes erected thereon ("the property").

[10] By the sale and purchase agreement dated 23 September 2008 ("the SPA"), the defendants agreed to sell the property to the plaintiff for RM320,000 out of which the plaintiff had paid a deposit of RM55,000 leaving a balance sum of RM265,000 to be settled by a bank loan.

[11] At the material time, the plaintiff's husband ("PW2") was renting the property from the defendants at a monthly rental of RM1,100 and the said tenancy was to expire on 31 December 2012.

[12] It has to be emphasised that after the SPA was signed, the defendants had not terminated the tenancy agreement and the tenancy continued until the occurrence of a fire on 5 November 2008 that rendered the property became unfit for occupation.

[13] Shortly afterwards, on 13 November 2008, the plaintiff's solicitors served a notice of termination under cl. 15 of the SPA to the defendants and requested for the return of the deposit and part payment of RM85,000 previously paid.

[14] Resulting from the fire, the defendants claimed and had received a sum of RM85,000 from the insurance company as a fire insurance compensation for the damage to the property caused by a fire.

[15] On 19 January 2009 the defendants' solicitors in reply, wrote to the plaintiff asking the plaintiff to pay within 30 days the balance of the purchase price.

[16] On 20 March 2009, the defendants' solicitors again wrote to the plaintiff's solicitors saying, "that the agreement has been mutually terminated and annulled forthwith".

[17] The plaintiff maintained that she was at all material times ready and willing to perform all her contractual obligations under the SPA if the defendants were willing to make good the loss and damage to the property caused by a fire.

[18] Eventually, the plaintiff commenced the present action against the defendants by filing a writ of summons and the statement of claim on 29 April 2010. The plaintiff sought, among others, the following reliefs:

(a) Specific performance of the contract;

(b) Alternatively, damages *in lieu* of specific performance for breach of contract with assessment of damages on the consequential loss and damage;

(c) Interest at the rate of 8% per annum on such damages from the date of the writ till date of full settlement or at such rate and for such period the court shall deem fit;

(d) Costs.

[19] In their counterclaim, the defendants claimed general damages for breach of contract and also sought for the following reliefs:

(a) Payment of RM315,000 for the loss and damages sustained by the defendants and still running;

(b) Loss and damages by the plaintiff for lodging the private caveat on the property;

(c) Costs.

The Findings Of The High Court

[20] The High Court found in favour of the plaintiff. The High Court allowed the plaintiff's claims and awarded her general damages in the sum of RM85,000 with interest at 4% per annum from 29 April 2010 until date of realisation and costs to be taxed unless agreed. The High Court also ordered that the plaintiff to withdraw the caveat on the property within 14 days of the receipt of the judgment sum. As indicated earlier, the defendants' counterclaim was dismissed with costs.

[21] The High Court found that the plaintiff had lawfully terminated the agreement pursuant to cl. 15 of the SPA *vide* her solicitor's letter dated 13 November 2008.

[22] In giving judgment in favour of the plaintiff, the High Court found that on the occurrence of a fire, the plaintiff not having been handed over vacant possession of the property by the defendants was perfectly within her rights

to terminate the agreement pursuant to cl. 15. For that reason, the High Court held that the plaintiff's termination was not in breach of the SPA.

[23] The High Court found that the defendants, instead of accepting the lawful termination by the plaintiff, had wrongly served a notice under cl. 11 of the SPA to terminate the agreement with the intention to forfeit the deposit.

[24] On the specific issue of vacant possession, despite the deeming provision in cl. 5 of the SPA, the High Court found that the defendants had failed to deliver vacant possession of the property to the plaintiff after the SPA was signed up to the date of the occurrence a fire.

[25] In arriving at the above finding, the High Court, having considered in particular the evidence of PW2 with regard to the continuation of the tenancy after the signing of the SPA, concluded that the defendants have not relinquished their rights over the property. By maintaining their rights under the tenancy agreement as the landlord, the defendants remained in possession of the property. It was held that this evidence of the defendants having continued to maintain possession of the property through the tenancy agreement, and not delivering vacant possession of the same had rebutted the deeming provision in cl. 5 of the SPA.

The Findings Of The Court Of Appeal

[26] On appeal by the defendants, the Court of Appeal unanimously agreed with the decision of the High Court and dismissed the defendants' appeal with costs.

[27] In dismissing the appeal, the Court of Appeal held that on the totality of the evidence and the factual matrix of the case, vacant possession of the property had never been given to the plaintiff and as such the plaintiff's reliance on cl. 15 of the SPA to terminate the agreement was entirely justified. The Court of Appeal further held that the High Court had rightly concluded that the plaintiff's termination relying on cl. 15 was in accordance with the SPA and the plaintiff was not in breach of the same.

[28] The Court of Appeal also held that the defendants had wrongfully terminated the SPA and their counterclaim was therefore rightly dismissed.

The Questions Of Law On Appeal To The Federal Court

[29] We have mentioned earlier that this court had granted leave to the defendants to appeal against the decision of the Court of Appeal on the following two questions of law, which to a large extent concern the construction of the various contractual clauses in the SPA:

(a) Whether the defendants can be held to be guilty of breach of contract when they merely exercise their right as conferred and agreed by the parties hereto under cl. 11 of the SPA to terminate the said contract and to forfeit the deposit money upon the refusal of the plaintiff to complete the purchase?

(b) Whether the law on deeming provisions is unique to the special condition attached thereto in each case and is not a matter for universal application applicable to other circumstances or cases including statutory deeming provisions?

[30] We will deal first with question 1, which in essence relates to cl. 11 of the SPA. As the disputes of the parties also centred on the proper construction of this contractual clause, it is appropriate to set out *in extenso* its full terms as follows:

> In the event that the Purchaser(s) shall fail or refuse or be unwilling to complete the purchase in accordance with the terms and conditions herein contained, the Vendor(s) shall be at liberty to terminate this Agreement, without prejudice to their right to sue for specific performance of this Agreement, by giving to the Purchaser(s) not less than THIRTY (30) days in writing and (unless in the meanwhile the Purchaser(s) shall be ready able and willing to pay the full balance outstanding and remedy their breach of this Agreement, if any) upon expiry of the said notice this Agreement shall be deemed to have been mutually terminated and annulled forthwith and in such event:
>
> (a) All sum or sums of which have been paid by the Purchaser(s) under this Agreement shall be forfeited by the Vendor(s);
>
> (b) Neither party shall have any further claim against the party;
>
> (c) Any caveat lodged by the Purchaser(s) or on their behalf against the said Property shall be forthwith withdrawn by the Purchasers at their own cost;
>
> (d) The Vendor(s) shall be at liberty to sell the said Property to any other party as they deem fit;
>
> (e) The Purchaser(s) shall require to re-deliver vacant possession of the said Property with it original condition to the Vendor(s) without any claims whatsoever, if the same shall have been delivered.

[31] Relying on the above contractual clause, learned counsel for the defendants submitted that the plaintiff had breached the agreement by her failure to perform or to pay the balance of the price of RM265,000 under the SPA. Citing the case of *Ching Yik Development Sdn Bhd v. Setapak Heights Development Sdn Bhd* [1997] 1 CLJ 287; [1996] 3 MLJ 675, he argued that the plaintiff's obligation to pay the balance of the purchase price under cl. 2 of the SPA was a fundamental term of the agreement and that by virtue of cl. 20, the plaintiff was obliged to pay the said balance of RM265,000 on or before the 23 November 2008.

[32] Learned counsel then argued that by reason of the plaintiff's breach of the fundamental term to perform or to pay the balance purchase price, the defendants had validly exercised their rights as conferred and agreed under and by virtue of cl. 11 by giving the plaintiff 30 days' notice by letter dated 19 January 2009 to pay the said balance purchase price failing which the

provisos in sub-paras. (a) to (e) would take effect. According to learned counsel, after the lapse of 30 days, that is to say, on or before 19 February 2009, the plaintiff did not perform or pay the balance purchase price, and therefore sub-paras. (a) to (e) of cl. 11, went into effect. Hence, it was submitted that both the High Court and the Court of Appeal were in grave error in holding that the defendants had, by resorting to and applying cl. 11, wrongfully terminated the SPA. This, according to learned counsel indicated a lack of judicial appreciation on the part of both the High Court and also the Court of Appeal warranting appellate intervention by this court (see *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309; [2005] 2 MLJ 1).

[33] We had given our utmost considerations to the submissions of learned counsel for the defendants but we found ourselves quite unable to agree with him.

[34] In the first place, as submitted by learned counsel for the plaintiff, the dispute between the two parties in substance revolved around the construction of a written contract and its clauses. We ourselves have read the entire terms and conditions of the SPA. In this regard, the point which has a strong bearing on the matter is that it is an established principle of construing a contract that, among others, a contract must be construed as a whole, in order to ascertain the true meaning of its several clauses, and also, so far as practicable, to give effect to every part of it. Each clause in an ordinary commercial contract should be so interpreted as to bring them into harmony with the other clauses of the contract (see *National Coal Board v. Wm Neill & Son (St Helens) Ltd* [1984] 1 All ER 555 which was cited in *Royal Selangor Golf Club v. Anglo-Oriental (M) Sdn Bhd* [1990] 1 CLJ 995; [1990] 3 CLJ (Rep) 37 and *Mulpha Pacific Sdn Bhd v. Paramount Corporation Bhd* [2003] 4 CLJ 294; [2003] 4 MLJ 357). In *Australian Broadcasting Commission v. Australasian Performing Right Association Limited* [1973] 129 CLR 99, it was held that the whole of the contract has to be considered, since the meaning of any one part of it may be revealed by other parts, and the words of every clause must if possible be construed so as to render them all harmonious one with another.

[35] Professor McMeel in *The Construction of Contracts, Interpretation, Implication and Rectification,* (2nd edn, 2011) explains in clear words this long-standing canon of construction at para 1.73 as follows:

> Both the traditional and the modern approaches to construction stress the importance of having regard to the instrument as a whole. It is important not to fixate on one particular word or phrase and thereby neglect the overall purpose of the document or to give disproportionate importance to one phrase or clause. This is a long-standing rule.

[36] As stated by Lewison in *The Interpretation of Contracts* 5th edn at para 7.02 that in order to arrive at the true interpretation of a document, a clause must not be considered in isolation, but must be considered in the context of the whole of the document. In *Chamber Colliery Company Ltd v. Twyerould (1893)* [1915] 1 Ch 268 (note) (which was cited by Lewison), Lord Watson said:

> I find nothing in this case to oust the application of the well-known rule that a deed ought to be read as a whole, in order to ascertain the true meaning of its several clauses; and that the words of each clause should be so interpreted as to bring them into harmony with the other provisions of the deed, if that interpretation does no violence to the meaning of which they are naturally susceptible.

[37] It is an undisputed fact that after the SPA was signed, the defendants had not terminated the tenancy agreement with PW2 and the tenancy continued until the occurrence of a fire on 5 November 2008. Moreover, resulting from the fire, the defendants had received a sum of RM85,000 from the insurance company as compensation for the damage to the property caused by the fire. The significance of the receipt of this payment by the defendants will be seen at a later stage of this judgment.

[38] At this point however it is particularly important to note that by way of a letter dated 13 November 2008, the plaintiff's solicitors served a notice of termination under cl. 15 of the SPA to the defendants and requested for the full refund of the deposit and the part-payment of RM85,000. The letter reads:

> RE: SALE AND PURCHASE AGREEMENT DATED 23RD SEPTEMBER 2008
>
> PROPERTY: LOT 437 BLOCK 22 BUAN LAND DISTRICT
>
> VENDORS: IK NGI PIAU & LUCY WONG NYUK KING (F)
>
> PURCHASER: HWANG MEE HIONG (F)
>
> WE act for the abovenamed Purchaser and refer to the above matter.
>
> We are instructed that the shophouse on the above Property was badly damaged by fire on 5th November 2008 at about 3 a.m. and that by reason of the damage to the shophouse caused by fire, our client does not wish to purchase the Property. With instructions, we hereby give this notice to terminate the above Agreement pursuant to Clause 15 thereof and demand for full refund of RM85,000.00, which had been paid by our client to the Vendors, within 14 days from this letter.
>
> We look forward to receiving promptly from you the said sum of RM85,000.00.

[39] What was stated in the above letter formed one of the foundations of the plaintiff's claim. In the letter, the plaintiff's solicitors had relied on cl. 15 of the SPA. It is very important now to take a closer and careful look at the wordings of that clause that expressly provides:

> 15 PROPERTY DAMAGED BY FIRE, ETC
>
> In the event before the delivery of the vacant possession of the said Property by the Vendor(s) to the Purchaser(s), the said Property or any part thereof shall be destroyed or substantially destroyed or damaged by fire and/or any other cause(s), it is hereby expressly agreed that the parties hereto shall be entitled unilaterally to rescind this Agreement by written notice whereupon the Vendor(s) shall on demand forthwith refund to the Purchaser(s) the deposit and all whatsoever monies paid herein, free of interest, in any event not exceeding fourteen (14) days upon receipt of written notification thereof, and upon such payment this Agreement shall become null and void and neither party shall have any claim against the other.

[40] As a matter of construction, it is plain for us to see that cl. 15 of the SPA unequivocally provided that in the event before the delivery of the vacant possession, the property was destroyed or damaged by a fire and other causes, either party was entitled to unilaterally to rescind the contract by a written notice whereupon the defendants as vendors shall, on demand forthwith refund to the plaintiff as purchaser the deposit and all whatsoever monies paid and in any event not exceeding fourteen days upon receipt of written notification.

[41] The key question, which we must then ask here, is: Whether vacant possession had been delivered to the plaintiff before the occurrence of the fire on 5 November 2008 and as a result the property was damaged and became unfit for occupation.

[42] To support his main contention that vacant possession had in fact been delivered to the plaintiff before the occurrence of the fire, learned counsel for the defendants brought to our attention to cl. 5 of the SPA, which may loosely be referred to as a 'deeming' provision. The material clause reads:

> 5 DELIVERY OF VACANT POSSESSION
>
> The vacant possession of the said Property shall be deemed to be delivered by the Vendor(s) to the Purchaser(s) upon signing of this agreement.

[43] The nub of the defendants' contention was that by virtue of the deeming provision, vacant possession had been given to the plaintiff on 23 September 2008, that is to say, on the date of signing of the SPA, which was well before the occurrence of a fire on 5 November 2008 and upon the failure of the plaintiff to pay the balance purchase price, they were entitled to rely on cl. 11 of the same to treat the contract to be mutually terminated.

[44] On the other hand, the contending grounds advanced by the plaintiff were in essence as follows. The clear contractual intention of the parties was clearly stated in cl. 15 of the SPA or otherwise the intention of the parties as in a written contract must be gathered from the whole of the contract. The defendants cannot conveniently ignore cl. 15 and take cl. 11 of the SPA out of context in taking advantage of their failure to meet their contractual obligations. The plaintiff contended that the property had never been given to her and as such her reliance on cl. 15 of the SPA to terminate the agreement was justified.

[45] The rival contentions of the parties on the issue of delivery of vacant possession bring into focus question 2, which in substance concerns the effect of a deeming provision in cl. 5 of the SPA.

[46] The first thing to notice is that by cl. 1 of the SPA, it was for the defendants to give vacant possession of the property to the plaintiff. We agreed with the submissions of learned counsel for the defendants only to this extent: To put into effect the deeming provision in cl. 5, both the parties must sign the SPA. In the context of the present case, as held by the High Court, by cl. 5 the plaintiff as a party to contract would have deemed to have taken possession of the property upon signing the SPA. But what happens when that which is to be "deemed" is in fact and truth is clearly wrong? In this regard, we agreed with the High Court and the Court of Appeal to the effect that, in the circumstances of the present case, the deeming provision in cl. 5 of the SPA was not conclusive, and that like any other presumption, rebuttable. Our reasons now follow.

[47] At the core of many sale and purchase of property disputes such as the present case is a written agreement. Words, which the parties chose to use when reaching their agreement may have looked as if obvious when the written agreement was signed, can appear unclear or uncertain years later when dispute arose. It is pertinent to note that 'deeming' provisions are frequently found in ordinary standard commercial contracts. The task of the court then is to give full effect to the words which the parties chose to use in the written agreement by construing it, as we have said earlier, as a whole, and as far as practicable, to give effect to every part of it. The court must begin its task of interpretation by carefully considering the language used by both parties (see *Mesuma Sports Sdn Bhd v. Majlis Sukan Negara Malaysia; Pendaftar Cap Dagangan Malaysia (Interested Party)* [2015] 9 CLJ 125; [2015] 6 AMR 314).

[48] As a starting point, the meaning of the word 'deemed' in cl. 5 of the SPA can be seen by referring to the *Oxford English Dictionary.* vol 111 D-E, Reprinted 1969: Deemed, is defined as, among others, thought and supposed. According to *KJ Aiyer's Judicial Dictionary* 13th edn, the word 'deemed' is used in various senses. Sometimes it means 'generally' regarded; at other times it signifies 'taken *prima facie* to be, while in other cases it means 'taken

conclusively to be'. More importantly, the learned author also stated that the meaning to the word 'deemed' must depend upon the context in which it is used.

[49] In this context, in the case of *Lafarge Aggregates Ltd v. Newham London Borough Council* [2005] 2 Lloyd's Rep 577, it was held that the word 'deemed' can mean 'presumed until the contrary is proved', but it can also be used as a word of definition, stating how matters are to be regarded definitively for the purposes of the contract or document in question.

[50] In *Marshall (Inspector of Taxes) v. Kerr* [1993] STC 360, Peter Gibson J in delivering the judgment of the English Court of Appeal said:

> For my part I take the correct approach in construing a deeming provision to be to give the words used their ordinary and natural meaning, consistent so far as possible with the policy of the Act and the purposes of the provisions so far as such policy and purposes can be ascertained; but if such construction would lead to injustice or absurdity, the application of the statutory fiction should be limited to the extent needed to avoid such injustice or absurdity, unless such application would clearly be within the purposes of the fiction. I further bear in mind that because one must treat as real that which is only deemed to be so, one must treat as real the consequences and incidents inevitably flowing from or accompanying that deemed state of affairs, unless prohibited from doing so.

[51] Even though the deeming provision in *Marshall (Inspector of Taxes) v. Kerr (supra)* case was considered in the context of the relevant statutory provisions, in our judgment, this line of reasoning can also be extended and applied in construing the effect of a deeming provision and its application in the construction of an ordinary commercial contract (see *Amanah Merchant Bank Bhd (Formerly known as Amanah-Chase Merchant Bank Bhd) v. Lim Tow Choon (Through Official Assignee)* [1994] 2 CLJ 1; [1994] 1 MLJ 413).

[52] In our judgment, if something is "deemed" in a situation where it is clearly wrong or inappropriate, which would lead to injustice or absurdity the application of the deeming provision should be limited to the extent needed to avoid such injustice or absurdity. We have emphasised earlier the importance of having regard to the written agreement as a whole in order to discover the true meaning of its several clauses. What is significant for present purpose is cl. 16 of the SPA, which unambiguously provides that the risk and benefit of any insurance on the property still remain with the vendors until delivery of vacant possession whereupon the risk shall pass to the purchaser and that the purchaser shall be responsible for arranging insurance coverage on the said property with effect from the date of delivery of vacant possession. In this context, it is necessary to make the point once more that the defendants claimed and had received a sum of RM85,000 from the insurance company as fire insurance compensation for the damage to the property caused by a fire. The defendants had the benefit of the risk in the

said property and received from the insurer a sum of RM85,000 as compensation. We should note that it would be a different thing if the plaintiff had accepted the risk at the time of signing the SPA.

[53] Now, once the structure or scheme of the SPA is seen, it is apparent that even with the deeming provision in cl. 5, this later provision in cl. 16 of the SPA would seem to imply that even upon signing of the SPA on 23 September 2008, the delivery of the vacant possession was not deemed conclusively. In our judgment, the effect of cl. 16 is that the expression 'shall be deemed' in cl. 5 was only meant to be a presumption that was rebuttable, for otherwise it would lead to injustice or absurdity in a situation where it was found that in fact and truth vacant possession of the property had never been delivered to the purchaser.

[54] This brings us to the case of *Amanah Merchant Bank Bhd v. Lim Tow Choon (supra)* which was heavily relied on by learned counsel for the defendants in support of the proposition that the words 'shall be deemed' meant 'shall be regarded as', and that the deeming provision in cl. 5 was therefore not something that was rebuttable. In that case the then Supreme Court considered a clause in a guarantee providing for the service of notices but not of an originating process. The notice in that case was a notice of demand, which was necessary to found a cause of action against the guarantor. The clause contained a 'shall be deemed to be served' provision. Mohamed Dzaiddin SCJ (as His Lordship then was) in delivering the judgment of the Supreme Court held that the words 'shall be deemed' in the clause meant 'shall be regarded as'. His Lordship considered the cases of *Canadian Imperial Bank of Commerce v. Haley* (1979) 100 DLR (3d) 470 and *R v. Westminster Unions Assessment Committee; Ex parte Woodward & Sons* (1917) 1 KB 832 where in the circumstances of the cases the deeming provision was not meant to be a presumption and was therefore not something that was rebuttable. In other words, the deeming provision used in *Amanah Merchant Bank Bhd v. Lim Tow Choon (supra)* was conclusive as to the deemed meaning or consequence and the defendant was precluded from showing otherwise. It is in this sense that Lewison in *The Interpretation of Contracts*, 5th edn, at para 14.12 stated that where a deeming clause is used, it would usually be conclusive as to the deemed meaning or consequence.

[55] We wish to put emphasis that *Amanah Merchant Bank Bhd v. Lim Tow Choon (supra)* and the cases cited therein did not involve an agreement, which contained similar clauses as in the present case. This distinction is crucial to note for the reason that, as we have said earlier, in the context of our case the effect of a reading of cl. 16 as a whole renders the deeming provision in cl. 5 to be a presumption that was rebuttable. Therefore, the case of *Amanah Merchant Bank Bhd v. Lim Tow Choon (supra)* is distinguishable on its facts.

[56] The point that we want to make can now be concluded as follows. In the context of the present case, the effect of the deeming provision in cl. 5 is that upon proof of one basic fact, that is to say upon signing the SPA,

A another fact called deemed fact, that is to say the delivery of vacant possession, is deemed to have been proved unless and until it is disproved or rebutted.

[57] Now, in deciding in favour of the plaintiff on the central issue of delivery of vacant possession, the Court of Appeal affirmed the findings of B fact of the High Court, which relied on the oral and contemporaneous documentary evidence of the parties. On this, the High Court made a finding of fact that the plaintiff had rebutted that vacant possession was delivered to her upon the signing of the SPA. This is what the High Court said:

C … the undisputed facts before the Court shows that by the time the shophouse was burnt down on the 5.11.2008 just 18 days short of the expected completion date of 23.11.2008, during this period after the Agreement was signed the Defendants had continued their tenancy over the shophouse with PW2 and did not (paragraphs 6 and 8 of the Statement of Claim):

D (i) terminate the tenancy agreement of PW2 (only expiring on 31.12.2012);

(ii) refund the tenancy deposit of RM3,300.00 to PW2; and

(iii) Immediately cease collection of the RM1,100.00 monthly rentals from PW2.

E

In other words the Defendants by maintaining these rights belonging to a registered proprietor of the property until it was destroyed by fire had not relinquished their rights to the occupancy of the shophouse through their tenant PW2 to the Plaintiff. The Defendants by not terminating their relationship with PW2 or to assign the benefit of the tenancy to the F Plaintiff have acted inconsistently and in contradiction with the deeming provision of delivery of vacant possession under Clause 5 of the Agreement.

...

G Under such circumstances, the Defendants cannot rely on the deeming provision of delivery of vacant possession in Clause 5 of the Agreement to estop the Plaintiff from rebutting with proof that no vacant possession was in fact actually delivered. This evidence of the Defendants having continued to maintain possession through the tenancy agreement and not delivered vacant possession of the shophouse is sufficient to rebut the deeming provision in Clause 5.

H

[58] On the issue of delivery of vacant possession, the Court of Appeal reached their conclusion in the following terms:

It is not strange to have a deeming provision in a contract. It is the bounden duty of the court to interpret the contract and give effect to the I intention of the contracting parties. While it was submitted as the expressed intention of the parties to have the vacant possession of the shophouse be deemed transferred on the singing of the SPA, the evidence clearly pointed in the opposite direction.

[59] In our judgment, the concurrent findings were clearly justified and correct based on the oral and contemporaneous documentary evidence led before the High Court. The conclusion was inescapable. The more closely we looked at the facts the more we were convinced that there was more than sufficient uncontroverted evidence to support the concurrent findings of the High Court as well as the Court of Appeal to the effect that the plaintiff had rebutted that vacant possession was delivered to her upon the signing of the SPA.

[60] It is axiomatic that we as an appellate court will not readily interfere with findings of fact arrived at by the court of first instance unless that court is shown to be plainly wrong in arriving at its decision (see *Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd* [2015] 2 CLJ 453). It has not been successfully shown to us that the findings of the High Court and the Court of Appeal were plainly wrong or perverse in any way.

[61] Accordingly, we agreed with the Court of Appeal that the defendants had never delivered vacant possession of the property to the plaintiff before the occurrence of a fire on 5 November 2008. Under the circumstances, the plaintiff's reliance on cl. 15 of the SPA to terminate the agreement was wholly justified and in accordance with the terms and conditions of the SPA. Accordingly, we also agreed with the Court Of Appeal that the defendants had wrongfully terminated the SPA and that their counterclaim was rightly dismissed.

Conclusion

[62] In light of our findings and in the circumstances of the case, it is unnecessary for us to answer the two questions of law as framed.

[63] In is for all these reasons that we had dismissed the defendants' appeal with costs of RM20,000 in favour of the plaintiff. The deposit was to be refunded to the defendants.

[64] This judgment is prepared pursuant to s. 78(1) of the Courts of Judicature Act 1964, as our learned brother, Apandi Ali FCJ has since resigned, upon his appointment as the Attorney-General of Malaysia.